

February

BEFORE THE  
POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

IN THE MATTER OF )  
INTERNATIONAL PAPER COMPANY, )  
Appellant, )  
v. )  
SOUTHWEST AIR POLLUTION )  
CONTROL AUTHORITY, )  
Respondent. )

PCHB No. 1128

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND ORDER

THIS MATTER, the appeal of a \$250 civil penalty for an alleged opacity violation having come on regularly for formal hearing on the 8th day of April, 1977 in Vancouver, Washington, and appellant International Paper Company appearing through its attorney George Twining, and respondent Southwest Air Pollution Control Authority appearing through its attorney, James D. Ladley with William A. Harrison, hearing examiner presiding, and the Board having considered the exhibits, records and files herein, having read the transcript and having reviewed the Proposed Decision of the presiding officer mailed

1 to the parties on August 8, 1977, and more than twenty days having  
2 elapsed from said service, and


3 The Board having received no exceptions to said Proposed Decision  
4 and the Board being fully advised in the premises, now therefore,


5 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that said Proposed  
6 Decision containing Findings of Fact, Conclusions of Law and Order  
7 dated the 5th day of August, 1977, and incorporated by reference  
8 herein and attached hereto as Exhibit A, are adopted and hereby entered  
9 as the Board's Final Findings of Fact, Conclusions of Law and Order  
10 herein

11 DONE at Lacey, Washington, this 6th day of Sept , 1977.

12 POLLUTION CONTROL HEARINGS BOARD

13   
14 WILLIAM A. GISSBERG, Chairman

15   
16 CHRIS SMITH, Member

17   
18 DAVE J. MOONEY, Member

19  
20  
21  
22  
23  
24  
25  
26 FINAL FINDINGS OF FACT,  
27 CONCLUSIONS OF LAW  
AND ORDER

BEFORE THE  
POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

IN THE MATTER OF  
INTERNATIONAL PAPER COMPANY,

Appellant,

v.

SOUTHWEST AIR POLLUTION  
CONTROL AUTHORITY,

Respondent.

PCHB No. 1128

FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND ORDER

This matter, the appeal of a \$250.00 civil penalty for an alleged opacity violation, came on for formal hearing before the Pollution Control Hearings Board, William A. Harrison, Hearing Examiner, presiding alone. Hearing was held at Vancouver, Washington, on April 8, 1977. Appellant has allegedly violated respondent's Regulation I and/or WAC 18-04-040(1)(b), a regulation of the State Department of Ecology. Appellant contends that it did not violate any regulation of the respondent and that, further, WAC 18-04-040(1)(b) of the State Department of Ecology is null and void for having been adopted without compliance

EXHIBIT A

1 with statutory rule-making procedures.

2 Appellant appeared through its attorney, George Twining; respondent  
3 appeared through its attorney, James D. Ladley. Eugene E. Barker,  
4 Olympia court reporter, provided recording services.

5 No witnesses testified. Exhibits were admitted. Counsel  
6 submitted post-hearing briefs.

7 From the argument of counsel at hearing, exhibits examined and  
8 briefs considered, the Pollution Control Hearings Board makes these

9 FINDINGS OF FACT

10 I

11 Appellant owns and operates a paper mill at Longview, Washington.

12 II

13 On November 17, 1976, between the hours of 9:43 a.m. and 10:02 a.m.  
14 brown and gray colored emissions emanated from the wood waste boiler  
15 stack at appellant's Longview paper mill. These emissions had the  
16 following duration and opacity:

17 a. 14-1/2 minutes at 30% opacity.

18 b. 5-1/4 minutes at 35% opacity.

19 c. 1/2 minute at 40% opacity.

20 The above minutes were consecutive. A written Notice of Violation was  
21 served upon appellant on November 19, 1976, (R-1). From this Notice,  
22 which imposes a \$250.00 civil penalty, appellant appeals.

23 III

24 Official notice is taken of respondent's Regulation I. Section 4.02(a)  
25 thereof, in effect at all times relevant to this appeal, provides:

26 FINDINGS OF FACT,  
27 CONCLUSIONS OF LAW  
AND ORDER

1 No person shall allow, cause, let, permit, or  
2 suffer the emission, for more than three minutes  
3 in any hour, of a gas stream containing air  
4 contaminants which is:

5 (1) Darker in shade as that designated as No. 2  
6 on the Ringelmann Chart as published by the United  
7 States Bureau of Mines or;

8 (2) Of such opacity as to obscure an observers  
9 view to a degree equal to or greater than smoke  
10 shade No. 2 described above.

11 . . .

12 IV

13 Official notice is taken of State Department of Ecology  
14 WAC 18-04-040<sup>1</sup> which was in effect at all times relevant to this  
15 appeal. That regulation provides, in pertinent part, as follows:

16 (1) Visible emissions.

17 (a) No person shall cause or permit the emission for  
18 more than three minutes, in any one hour, of an air con-  
19 taminant from any source which at the emission point, or  
20 within a reasonable distance of the emission point, exceeds  
21 40% opacity . . .

22 (b) For all new sources and, after July 1, 1975 for  
23 all sources, no person shall cause or permit the emission,  
24 for more than 3 minutes in any one hour, of an air  
25 contaminant from any source which at the emission point, or  
26 within a reasonable distance of the emission point, exceeds  
27 20% opacity . . . (emphasis added)

28 V

29 Official notice is taken of documents marked A-1 through A-18  
30 which comprise the complete Code Reviser's record of rule-making action  
31 on WAC 18-04-040 from its adoption to the date of this alleged violation  
32 and afterward. Notice of intention to adopt rules was filed with the  
33

34 1. Chapter 18-04 WAC was repealed and readopted as chapter 173-400  
35 WAC on December 21, 1976, which was subsequent to these litigation  
36 events which occurred on November 17, 1976.

37 FINDINGS OF FACT,  
38 CONCLUSIONS OF LAW AND ORDER

1 Code Reviser on

2 November 24, 1971 and

3 December 3, 1971 and

4 January 5, 1972.

5 These notices stated the time and place of five separate public hearings  
6 for receipt of oral comments and allowed until January 14, 1972 for the  
7 receipt of written comments.

8 Adoption of WAC 18-04-040 occurred on January 24, 1972, the text  
9 then being identical, in pertinent part, to that in existence at the  
10 time of this alleged violation.

11 VI

12 Any Conclusion of Law which should be deemed a Finding of Fact  
13 is hereby adopted as such.

14 From these Findings the Board comes to these

15 CONCLUSIONS OF LAW

16 I

17 The Hearings Board has jurisdiction over the persons and subject  
18 matter of this appeal.

19 II

20 Appellant's emissions were not in violation of respondent's  
21 Regulation I, Sec. 4.02(a), as that rule allows up to three minutes  
22 of opacity equal to No. 2 on the Ringelmann Chart which is 40% opacity.  
23 We have found that appellant's emissions were at the level of 40%  
24 opacity for but 1/2 minute.

25 FINDINGS OF FACT,  
26 CONCLUSIONS OF LAW  
27 AND ORDER

III

Appellant caused emissions which violated WAC 18-04-040(1)(b) which prohibits,<sup>2</sup> for all sources after July 1, 1975, any emission of more than three minutes, in any one hour, which exceeds 20% opacity.<sup>3</sup>

Appellant argues, however, that the above regulation is void because it reduces maximum opacity from 40 percent to 20 percent, after July 1, 1975, while Department of Ecology did not resort to the rule-making procedures of the Administrative Procedure Act, chapter 34.04 RCW, on or just prior to July 1, 1975.

We find no merit in this argument.

2. State Department of Ecology WAC 18-04-040(1)(b) is more stringent than is the corresponding Regulation I, Section 4.02(a) of respondent. The respondent, a local air pollution control authority, is therefore entitled to enforce the state regulation in lieu of enforcement by the State Department of Ecology. RCW 70.94.331(6). "State Board" succeeded by State Department of Ecology, RCW 43.21A.060(3).

3. We do not conclude that appellant's emissions emanated from a "new source" as that term is used in WAC 18-04-040(1)(b). WAC 18-04-020(14) defines "new source" as:

. . . a source constructed, installed or established after the effective date of this chapter. Addition to or enlargement or replacement of a source or any major alteration therein shall be construed as construction or installation or establishment of a new source. . . .

The effective date of "this chapter" (18-04 WAC) is 30 days after the date of filing, RCW 34.04.040(2), which filing occurred on January 24, 1972.

We note in passing that respondent has attached to its post-hearing brief a document which, on its face, indicates that the source here involved may have been installed after the effective date of chapter 18-04 WAC, and thus be a "new source". This would provide an alternative basis for concluding that appellant violated WAC 18-04-040(1)(b). We are unable to consider the probative weight of the above document without motion to reopen the hearing so that this document may be offered into evidence with opportunity in the appellant to contest it.

FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

IV

The rule-making procedures of the Administrative Procedure Act are found at RCW 34.04.025 which states:

Notices of intention to adopt rules--Opportunity to submit data--Noncompliance, effect. (1) Prior to the adoption, amendment or repeal of any rule, each agency shall:

(a) Give at least twenty days notice of its intended action by filing the notice with the code reviser, mailing the notice to all persons who have made timely request of the agency for advance notice of its rule-making proceedings, and giving public notice as provided in chapter 42.30 RCW, as now or hereafter amended. Such notice shall include (i) reference to the authority under which the rule is proposed, (ii) a statement of either the terms or substance of the proposed rule or a description of the subjects and issues involved, and (iii) the time when, the place where, and the manner in which interested persons may present their views thereon.

(b) Afford all interested persons reasonable opportunity to submit data, views, or arguments, orally or in writing. In case of substantive rules, opportunity for oral hearing must be granted if requested by twenty-five persons, by a governmental subdivision or agency, or by an association having not less than twenty-five members. The agency shall consider fully all written and oral submissions respecting the proposed rule. Upon adoption of a rule, the agency, if requested to do so by an interested person either prior to adoption or within thirty days thereafter, shall issue a concise statement of the principal reasons for and against its adoption, incorporating therein its reasons for overruling the considerations urged against its adoption.

(2) No rule hereafter adopted is valid unless adopted in substantial compliance with this section, or, if an emergency rule designated as such, adopted in substantial compliance with RCW 34.04.030, as now or hereafter amended. In any proceeding a rule cannot be contested on the ground of noncompliance with the procedural requirements of this section, or of RCW 34.04.030, as now or hereafter amended, after two years have elapsed from the effective date of the rule.

Department of Ecology is an "agency" which is required to comply with the above rule-making requirements prior to the "adoption," "amendment" or "repeal" of any rule.

FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND ORDER



V

Department of Ecology complied with rule-making procedures (RCW 34.04.025) upon adoption of WAC 18-04-040 in 1972. Nevertheless, appellant urges that the clause of WAC 18-04-040 that reduces allowable opacity from 40 percent to 20 percent after July 1, 1975, constitutes "amendment" or "repeal" of a rule under RCW 34.04.025 requiring further procedure under that section. We find no definition of the terms "amendment" or "repeal" within the Administrative Procedure Act, chapter 34.04 RCW.

We have found, however, (see Finding of Fact II) that the clause reducing 40 percent to 20 percent after July 1, 1975, was present in WAC 18-04-040 during proposal and adoption of that rule in 1972. Thus, that clause was subject, in and just prior to 1972, to the comments of all interested persons according to the procedures set out by RCW 34.04.025. We find neither authority nor policy requiring that an agency be saddled with the ungainly and curious burden of twice carrying out the requirements of RCW 34.04.025 before placing a single rule into effect. We therefore interpret the terms "amendment" and "repeal," appearing in RCW 34.04.025, to exclude rule changes--such as this one--already subjected to the rule-making procedure of that section. For this reason, WAC 18-04-040 is not void for lack of compliance with rule-making procedures of the Administrative Procedure Act and appellant's violation stands.

VI

Appellant states that private industry and others should have had an opportunity to present Department of Ecology with new information

FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

concerning opacity which may have become available between adoption of WAC 18-04-040 on January 24, 1972 and its effective date, July 1, 1975. Such new information may have a bearing upon the suitability of the 20 percent opacity standard here concerned and the possibility that it should be changed.

Such an opportunity has existed, and continues to exist to this moment in the form of RCW 34.04.060 of the Administrative Procedure Act which states:

Petition for adoption, amendment, repeal of rule--Agency action. Any interested person may petition an agency requesting the promulgation, amendment, or repeal of any rule. Each agency shall prescribe by rule the form for such petitions and the procedure for their submission, consideration, and disposition. Within thirty days after submission of a petition, or at the next meeting of the agency if it does not meet within thirty days, the agency shall formally consider the petition and shall within thirty days thereafter either deny the petition in writing (stating its reasons for the denial) or initiate rule-making proceedings in accordance with RCW 34.04.025.

## VII

Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions the Pollution Control Hearings Board enters this

## ORDER

The violation and \$250.00 civil penalty set forth in respondent's Notice of Violation dated November 18, 1976, (R-1) are each hereby affirmed.

FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND ORDER

1 DATED this 5<sup>th</sup> day of August, 1977.

2 *William A. Harrison*

3 WILLIAM A. HARRISON  
4 Presiding Officer

5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26 } FINDINGS OF FACT,  
27 } CONCLUSIONS OF LAW  
AND ORDER